

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FLAGSHIP WEST, LLC, a California
limited liability company, MARVIN
G. REICHE, and KATHLEEN REICHE,

Plaintiffs,

v.

EXCEL REALTY PARTNERS, L.P., a
Delaware limited liability
partnership, and NEW PLAN EXCEL
REALTY TRUST, INC., a Maryland
corporation, *et al.*,

Defendants.

1:02-cv-5200 OWW DLB

MEMORANDUM DECISION AND ORDER
RE DEFENDANT'S MOTION TO
STRIKE AND PLAINTIFF'S
REQUEST FOR ENTRY OF JUDGMENT
OF RESCISSION AND FOR
PREJUDGMENT INTEREST

(DOC. 523, 518)

I. INTRODUCTION

Before the court are (1) Flagship West, LLC, Marvin G. Reiche, and Kathleen Reiche's (together, "Plaintiffs") request for entry of judgment of rescission and for prejudgment interest (Doc. 518) and (2) Excel Realty Partners, L.P. and New Plan Excel Realty Trust, Inc.'s (together, "Defendants") motion to strike Plaintiffs' request for entry of judgment of rescission and request for prejudgment interest (Doc. 523). Both motions are opposed, and were heard May 23, 2011.

II. BACKGROUND

On July 16, 1998, Defendants, owner of the Briggsmore Plaza in Modesto, executed a 15-year lease with Flagship West, LLC ("Flagship"), whose only members are Marvin and Kathleen Reiche, for the "exclusive right to operate a self service buffet style

1 family restaurant" in the Briggsmore Plaza. To construct the
2 restaurant, Plaintiffs secured a 25-year, \$2 million loan from
3 The Money Store. Plaintiffs' restaurant, a Golden Corral
4 franchise, opened on June 10, 1999. Approximately one year later,
5 Defendant leased a space to another buffet style restaurant, Four
6 Seasons, which opened in the Briggsmore Plaza directly across
7 from Plaintiffs' restaurant. Plaintiffs contended that Four
8 Seasons' location and operation in the Briggsmore Plaza breached
9 the exclusivity provision in their lease, caused their restaurant
10 to become unprofitable, and led to its failure and closure on
11 April 1, 2001.
12

13 Plaintiffs sued Defendants for breach of contract, fraud,
14 negligent misrepresentation, contract damages, and rescission.
15 The case was tried before a jury beginning on November 12, 2003.
16 Judgment as a matter of law was granted in favor of Defendant New
17 Plan Excel Realty Trust, Inc. ("New Plan") and against Plaintiffs
18 on November 23, 2003 on all Plaintiffs' claims against New Plan.
19

20 On December 3, 2003, the jury returned a verdict against
21 Excel and in Plaintiffs' favor based on its determination that
22 Excel materially breached an "exclusive use" provision of the
23 lease, and awarded Plaintiffs \$1,480,740 in contract damages.
24 Entry of judgment was deferred to permit Flagship to elect (1)
25 rescission and rescission damages or (2) damages for breach of
26 contract. The court invoked judicial estoppel to prevent Excel
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1 from asserting that § 4.5 of the lease barred rescission.
2 Plaintiffs elected to rescind the lease. By order dated November
3 14, 2006, Plaintiffs were awarded \$2,142,175 in rescission
4 damages and denied prejudgment interest. Doc. 387, 28. Judgment
5 was entered December 14, 2006 (Doc. 390), and amended June 15,
6 2007 (Doc. 426).

7
8 Excel appealed the judgment to the Ninth Circuit. Plaintiffs
9 filed a cross-appeal to reverse the judgment as to New Plan and
10 modify the calculation of rescission damages. The Ninth Circuit
11 held:

12
13 Consequently, we vacate the district court's judgment
14 awarding rescission damages to Flagship and remand so that
15 the district court may determine in the first instance
16 whether the contract, in its entirety, allows for rescission
17 and whether California law would give effect to the lease's
18 limitations on remedies in these circumstances. We do not
19 reach either party's claims related to the calculation of
20 rescission damages and express no opinion on those claims.

21
22 *Flagship West, LLC v. Excel Realty Partners LP*, 337 Fed.Appx.
23 679, *681, 2009 WL 2015770 (9th Cir. 2009).

24
25 On remand, the primary issue was the interpretation of § 4.5
26 of the lease. Doc. 517. A memorandum decision and order dated
27 December 20, 2010 concluded that the lease, in its entirety,
28 allows for rescission and California law gives effect to
rescission of the lease under the totality of the circumstances
of the action. Doc. 517, 96.

III. DISCUSSION

A. Motion to Strike

Excel moves to strike Plaintiffs' request for entry of judgment of rescission and request for prejudgment interest. Excel contends that Plaintiffs' request for entry of judgment is a defective application for reconsideration and must be stricken. Plaintiffs rejoin that the rules regarding reconsideration are inapplicable because the prior judgment was vacated.

Rule 12(f) provides that the court "may order stricken from any *pleading* any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f) (emphasis added). Plaintiffs' request for entry of judgment is not a pleading. See Fed. R. Civ. P. 7(a) (defining a pleading as "(1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer."). Defendants' motion to strike is improper; the proper means to challenge Plaintiffs' motion is an opposition.

Even if Defendants' motion to strike was proper, it is meritless. "When a judgment has been rendered and later set aside or vacated, the matter stands precisely as if there had been no judgment. The vacated judgment lacks force or effect and places the parties in the position they occupied before entry of

1 judgment." *Ditto v. McCurdy*, 510 F.3d 1070, 1077 and n.4 (9th Cir.
2 2007). The Ninth Circuit vacated the court's prior judgment,
3 rendering it without "force or effect." *Id.* Plaintiffs may move
4 for entry of judgment.

5 Excel's motion to strike is DENIED.

6
7 B. Plaintiffs' Request for Entry of Judgment of Rescission
8 and for Prejudgment Interest

9 1. Propriety of Request

10 Excel contends that Plaintiffs' request for prejudgment
11 interest and reconsideration of its prior orders exceeds the
12 Ninth Circuit's mandate:

13 Consequently, we vacate the district court's judgment
14 awarding rescission damages to Flagship and remand so that
15 the district court may determine in the first instance
16 whether the contract, in its entirety, allows for rescission
17 and whether California law would give effect to the lease's
18 limitations on remedies in these circumstances. We do not
19 reach either party's claims related to the calculation of
20 rescission damages and express no opinion on those claims.

21 *Flagship West, LLC v. Excel Realty Partners LP*, 337 Fed.Appx.
22 679, *681, 2009 WL 2015770 (9th Cir. 2009).

23 Excel asserts that the Ninth Circuit's instructions limit
24 the court's review to two specified issues: (1) whether the
25 contract, in its entirety, allows for rescission, and (2) whether
26 California law would give effect to the lease's limitations on
27 remedies in these circumstances. Plaintiffs rejoin that the Ninth
28 Circuit expressly declined to address the parties' dispute
regarding the calculation of damages, and neither the law nor

1 mandate forecloses further determinations regarding damages,
2 including prejudgment interest.

3 Generally, "[a]lthough lower courts are obliged to execute
4 the terms of a mandate, they are free as to anything not
5 foreclosed by the mandate" *Cassett v. Stewart*, 406 F.3d
6 614, 621 (9th Cir. 2005) (quoting *United States v. Kellington*, 217
7 F.3d 1084, 1092-93 (9th Cir. 2000). "The mandate is controlling as
8 to all matters within its compass; however, any issue not
9 expressly or impliedly disposed of on appeal may be considered by
10 the trial court on remand." *Kearns v. Field*, 453 F.2d 349, 350
11 (9th Cir. 1972) (citations omitted). Federal Rule of Civil
12 Procedure 37(b), however, requires that "[i]f the court modifies
13 or reverses a judgment with a direction that a money judgment be
14 entered in the district court, the mandate must contain
15 instructions about the allowance of interest." Fed. R. Civ. P.
16 37(b) .

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19 Defendants cite *Planned Parenthood of the Columbia/*
20 *Williamette Inc. v. American Coalition of Life Activists*, 518
21 F.3d 1013 (9th Cir. 2008). In *Planned Parenthood*, the Ninth
22 Circuit held that under Rule 37, when the Court of Appeals
23 modifies or reverses judgment with the direction that a
24 particular money judgment be entered on remand, and the mandate
25 does not contain instructions about allowance of interest, the
26 district court cannot enter judgment for a different amount or
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1 grant interest. *Id.* at 1018. The *Planned Parenthood* court
2 stressed that Rule 37 "governs *only* when our mandate 'modifies or
3 reverses a judgment with a direction that a money judgment be
4 entered in the district court.'" *Planned Parenthood*, 518 F.3d at
5 1019. It is inapplicable.

6
7 Defendants also cite *Newhouse v. Robert's Ilima Tours, Inc.*,
8 708 F.2d 436 (9th Cir. 1983). In *Newhouse*, the Ninth Circuit
9 reversed the district court's award of costs plus interest on
10 remand as beyond the scope of the Court of Appeal's mandate. *Id.*
11 at 441-442 *Newhouse* is distinguishable because the Ninth Circuit
12 asked the district court to clarify the basis of its damages
13 award and to reconsider the attorney's fees award in light of
14 another case. *See id.* Its mandate specifically discussed a money
15 judgment and did not specify interest. *Id.*

16
17 Here, the Ninth Circuit vacated the original money judgment
18 and remanded the case for consideration of two issues, but did
19 *not* direct the entry of a money judgment. Rule 37(b) is
20 inapplicable. *See Guam Soc'y of Obstetricians & Gynecologists v.*
21 *Ada*, 100 F.3d 691, 703 (9th Cir. 1996) ("Rule 37 is inapposite
22 because we never directed that a money judgment be entered in the
23 district court. To the contrary, we vacated the money judgment so
24 the district court could reconsider its ruling."); *see also*
25 *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 103-104 (2nd
26 Cir. 2004) (holding that for Rule 37(b) to apply, there must be
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1 some indication that the mandate is directing entry of a
 2 *particular* money judgment; Rule 37(b) did not apply to a mandate
 3 simply vacating the district court's judgment and remanding "for
 4 further proceedings in accordance with the opinion of this
 5 Court"). "When the court of appeals remands to the district court
 6 to determine the amount of a damages award, then the mandate does
 7 not direct the entry of a money judgment." *Planned Parenthood*,
 8 518 F.3d at 1019. Here, the Ninth Circuit explicitly stated that
 9 they "do not reach either party's claims related to the
 10 calculation of rescission damages and express no opinion on those
 11 claims." *Flagship West, LLC v. Excel Realty Partners LP*, 337
 12 Fed.Appx. 679, *681, 2009 WL 2015770 (9th Cir. 2009).

14 Plaintiffs' request for entry of judgment of rescission and
 15 request for prejudgment interest is proper.

17 2. Calculation of Rescission Damages

18 a) Damages

19 The court previously considered each component of
 20 Plaintiffs' requested damages, and made detailed findings
 21 regarding each component before entering judgment. Doc. 387. The
 22 court previously granted Plaintiffs \$2,590,406 for damages in
 23 rescission, as follows:

Awarded	Requested	Item
\$1,239,030	\$1,270,252	Construction Costs
\$ 589,271	\$ 598,782	Equipment Expenditures
\$ 30,000	\$ 30,000	Opening Inventory for Restaurant
\$ 104,176	\$ 104,176	Building & Related Fees
\$ 30,000	\$ 30,000	Franchise Fee

\$ 18,749	\$ 18,749	Training of Modesto Staff
\$ 27,956	\$ 27,956	Construction Interest
\$ 372,575	\$ 372,575	Rent Paid to Excel
\$ 186,394	\$ 303,556	Interest Paid After Opening
\$ 0	\$ 548,111	Interest on Money Store Loan
\$ 0	\$ 186,903	Business Losses

Doc. 387, 28. Plaintiffs do not offer any new evidence or arguments with respect to the components of rescission damages. The court's analysis as to damages remains unchanged.

b) Credits

In the vacated judgment, the court granted Defendants the following credits to offset Plaintiffs' damages:

Awarded	Requested	Item
(\$ 434,716)	(\$ 434,716)	Credit for Rent Paid/Owed to Excel
(\$ 10,000)	(\$ 10,000)	Credit for Rental Income Credit
(\$ 11,260)	(\$ 11,260)	Credit for Equipment Sale

Doc. 387, 28. Although Plaintiffs did not previously dispute Defendants' entitlement to these credits, Plaintiffs now contest the \$434,716 rental value offset.

As a general rule, when a vendee rescinds a contract pursuant to California Civil Code § 1691, the vendor is entitled to the "reasonable rental value of the land while it was in the vendee's possession." *McCoy v. West*, 70 Cal.App.3d 295, 301, 138 Cal.Rptr. 660 (1977). California Civil Code § 1691 states that a party rescinding a contract must offer to "[r]estore to the other party everything of value which he has received from him under the contract" Cal. Civ. Code § 1691. California Civil Code § 1692 provides in pertinent part:

1 If in an action or proceeding a party seeks relief based
2 upon rescission, the court may require the party to whom
3 such relief is granted to make any compensation to the other
which justice may require and may otherwise in its judgment
adjust the equities between the parties.

4 Cal. Civ. Code § 1692.

5 Plaintiffs contend that a rental value offset is
6 inappropriate where the non-rescinding party has materially
7 breached the lease, depriving the rescinding party of the value
8 of the leased premises. Plaintiffs assert that they did not
9 expect to break even for at least two years, never made a profit,
10 and did not receive any benefit from renting Defendants'
11 property.
12

13 Plaintiffs cite *McCoy v. West*, 70 Cal.App.3d at 304:

14 [W]here, as here, the vendor of a business enterprise
15 existing for the purpose of making a profit sells the
16 business to a buyer under a contract of sale, and thereafter
17 the contract of sale is rescinded on the grounds of the
18 vendor's fraud, the vendor is not entitled to receive the
reasonable rental value for the vendee's use of the business
without proof that the vendee's profits equaled or exceeded
19 the reasonable rental value. We further hold that absent
20 such proof, the guilty vendor is at most entitled to the
profits, if any, the vendee may have made in the operation
of the business during the period that the vendee was in
possession thereof.
21

22 Plaintiffs also cite *Pendall v. Warren*, 101 Cal.App. 407, 410
23 (1929):

24 [T]he amount to be credited to the guilty vendor is not,
25 strictly speaking, rental, for obviously there is no
contractual relation which imposes on the vendee the
26 obligation to reimburse the vendor for rent; it is only to
the extent that the vendee has profited by the undertaking
27 that he is required in good conscience to restore to the
vendor.
28

1 Plaintiffs further cite *In re Lloyd*, 369 B.R. 549, 562-63
2 (Bkrtcy. N.D. Cal. 2007), *affirmed by* 572 F.3d 999 (9th Cir.
3 2009), which held that under California law, the party rescinding
4 a contract need not restore value received from the other party
5 where that value has been fully offset by other effects of the
6 transaction.
7

8 Defendants do not offer any case law or arguments to counter
9 Plaintiffs' contest of the rental offset based on their lack of
10 profitability. At the hearing, Defendants asserted that
11 Plaintiffs entered into a Forbearance Agreement with their
12 lender, The Money Store, in which Plaintiffs agreed to continue
13 paying rent to Defendants pending conclusion of the lawsuit.
14 Defendants assert that Plaintiffs chose not to relinquish the
15 premises back to Defendants, and benefitted from the forbearance
16 of their Money Store loan.
17

18 The memorandum decision dated September 5, 2005 states:

19 In exchange for Plaintiffs' agreement to continue to pay
20 rent, The Money Store agreed under to [sic] the Forbearance
21 Agreement to allow interest on the loan to accrue unpaid
22 pending resolution of the case. In accordance with that
agreement, Plaintiffs have not paid this interest and it
continues to accrue to date.

23 Doc. 362, 25 n.9. Plaintiffs' initial refusal to disclose the
24 Forbearance Agreement resulted in an order precluding Plaintiffs
25 from obtaining any benefit from the Forbearance Agreement.
26 Plaintiffs chose to stay on Defendants' premises, pay the rent,
27 not mitigate their damages, and benefit from the Forbearance
28

1 Agreement. Plaintiffs cannot now claim a lack of benefit from
2 their rent payment.

3 The court's original calculation of damages and credits, as
4 set forth in the Memorandum Decision dated November 14, 2006
5 (Doc. 387), remains unchanged.

6
7 c) Prejudgment Interest

8 (1) Section 3287(a); Prejudgment Interest
9 from Rescission Date

10 Plaintiffs request an award of prejudgment interest on the
11 entire damages award from the date of rescission under Section
12 3287(a). Alternatively, Plaintiffs seek prejudgment interest on
13 the individual components of the award that were certain.

14 In a diversity action, prejudgment interest is governed by
15 state law. *In re Exxon Valdez*, 484 F.3d 1098, 1101 (9th Cir.
16 2007). Plaintiffs seek prejudgment interest under California
17 Civil Code Section 3287(a), which provides:

18 Every person who is entitled to recover damages certain, or
19 capable of being made certain by calculation, and the right
20 to recover which is vested in him upon a particular day, is
21 entitled also to recover interest thereon from that day,
22 except during such time as the debtor is prevented by law,
23 or by the act of the creditor from paying the debt. This
24 section is applicable to recovery of damages and interest
from any such debtor, including the state or any county,
city, city and county, municipal corporation, public
district, public agency, or any political subdivision of the
state.

25 Under section 3287(a), prejudgment interest is available when
26 "defendant actually know[s] the amount owed or from reasonably
27 available information could the defendant have computed that
28

1 amount." *Cassinovs v. Union Oil. Co.*, 14 Cal. App. 4th 1770, 1789
2 (1993). "Damages are deemed certain or capable of being made
3 certain within the provisions of [§ 3287(a)] where there is
4 essentially no dispute between the parties concerning the basis
5 of computation of damages if any are recoverable but where their
6 dispute centers on the issue of liability giving rise to damage."
7 *Fireman's Fund Ins. Co. v. Allstate Ins. Co.*, 234 Cal.App.3d
8 1154, 1173 (1991). Section 3287(a) does not authorize pre-
9 judgment interest where the amount of damages "depends upon a
10 judicial determination based upon conflicting evidence and is not
11 ascertainable from truthful data supplied by the claimant to his
12 debtor." *Id.*; *Highlands Ins. Co. v. Cont'l Cas. Co.*, 64 F.3d 514,
13 521 (9th Cir. 1995).

14
15
16 Plaintiffs' request for prejudgment interest was previously
17 denied by memorandum decision dated November 11, 2006. (Doc. 387,
18 25-28). The memorandum decision concluded that under no
19 reasonable application of the law could the following damages be
20 calculated by reference to a fixed standard or fixed payment
21 schedule:

22 \$1,239,030 for construction costs, \$589,271 for equipment,
23 \$30,000 for opening inventory, \$104,176 for building and
24 associated fees, \$30,000 for the franchise fee, and \$18,749
for training.

25 *Id.* at 27. This analysis remains unchanged.

26 The memorandum decision concluded that the rent and interest
27 payments (\$27,956 in construction interest and \$186,394 in
28

1 interest paid) were fixed and certain, but that the rent had been
2 offset entirely by the rental credit. The sole issue as to
3 prejudgment interest in the November 14, 2006 memorandum decision
4 was whether prejudgment interest could be awarded piecemeal on
5 separate fixed and determinable components of damages. No
6 supporting authority was provided or located, and severance of
7 certain categories of damages was found to be inconsistent with
8 the overall purpose of restricting prejudgment interest to cases
9 in which a person's entitlement to recover damages is "certain,
10 or capable of being made certain by calculation." Cal. Civil
11 Code. § 3287(a). *Id.* at 27.
12

13 Plaintiffs argue that California law is clear that
14 prejudgment interest shall be awarded under Section 3287(a),
15 regardless of whether the entire award of damages meets the
16 requirements of Section 3287(a). Plaintiffs cite two
17 distinguishable cases, *Stein v. Southern California Edison*
18 *Company*, 7 Cal.App.4th 565, 8 Cal.Rptr.2d 907 (1992), and *Bullis*
19 *v. Security Pacific National Bank*, 21 Cal.3d 801 (1978). The
20 *Stein* and *Bullis* courts awarded interest on all components of
21 damages, but the components had different accrual dates. At issue
22 was whether the damage components could have different vesting
23 dates, not whether they could be calculated with certainty to be
24 awarded separately. *See Stein*, 7 Cal.App.4th at 573 (holding that
25 the trial court did not err in allowing prejudgment interest from
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1 the different dates of notice); *Bullis*, 21 Cal.3d at 815
2 (upholding an award of interest on each of several unauthorized
3 withdrawals from a bank account over a four-year period, from the
4 date of individual withdrawal).

5 Plaintiffs also cite *Parker v. Maier*, 180 Cal.App.2d 630,
6 (1960). In *Parker*, the court awarded prejudgment interest on
7 expenses incurred, but not on value of services. *Id.* at 635-636.
8 The previous denial of prejudgment interest on the separate,
9 certain components was due to the lack of supporting authority.
10 *Parker v. Maier* provides sufficient authority to grant
11 prejudgment interest under Section 3287(a) on the separate
12 calculable components of damages. Defendants do not offer any
13 contrary authority or otherwise address this argument.
14
15

16 Plaintiffs' request for prejudgment interest is GRANTED as
17 to the \$214,350 interest paid on the Money Store loan and DENIED
18 as to other unfixed components of Plaintiffs' damages award.

19 (2) Section 3287(a); Prejudgment Interest
20 from November 14, 2006

21 Alternatively, Plaintiffs request that if the court does not
22 award prejudgment interest from the date of rescission,
23 Plaintiffs are entitled to prejudgment interest from the date of
24 the November 14, 2006 order fixing Plaintiffs' rescission damages
25 (Doc. 387), through the date of the judgment after remand.
26 Plaintiffs contend that damages were certain once the court
27 calculated them on November 14, 2006.
28

1 Plaintiffs cite *AT&T v. United Computer Systems, Inc.*, 98
2 F.3d 1206 (9th Cir. 1996):

3 Where a prior judgment awarding damages has been vacated
4 pursuant to the actions of an ultimately losing party,
5 equitable principles favor calculating the interest in a
6 manner that more fully compensates the prevailing party. Any
7 other result would penalize the prevailing party, and in
8 certain circumstances might also encourage losing parties to
9 instigate postjudgment litigation so they can reap the
10 benefits of a low interest rate. We see no inconsistency
between this holding and the requirements of 28 U.S.C. §
1961 which provides simply that postjudgment interest be
"allowed on any money judgment ... from the date of the
entry of the judgment[.]"

11 Id. at 1211. Defendant contends that *AT&T* is distinguishable
12 because the issue was whether to *continue* the imposition of
13 prejudgment interest, not whether to award prejudgment interest.
14 In *AT&T*, the claimant was entitled to prejudgment interest
15 predating the original judgment in the district court. Defendants
16 contend that because Plaintiffs were not previously awarded
17 prejudgment interest in the vacated judgment, they are not
18 entitled to continuation of such nonexistent interest.
19

20 Defendants cite *Pacific Fuel Co., LLC v. Shell Oil Co.*, 2011
21 WL 676898 (9th Cir. 2011), an unpublished, non-precedential case,
22 for its conclusion that Plaintiffs are not entitled to
23 prejudgment interest under California Rule of Court 3.1802¹ or 28
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27 ¹ California Rules of Court, Rule 3.1802 provides: "The clerk must include in
the judgment any interest awarded by the court and the interest accrued since
the entry of the verdict."
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1 U.S.C. § 1961². Plaintiffs correctly point out that their
2 argument is based on California Civil Code § 3287(a), not the
3 procedural Rule 3.1802, and that they are seeking pre, not post,
4 judgment interest.

5 Plaintiffs cite *Kolodziey v. Kmart Corporation*, 2001 WL
6 1264547, *14 (Cal.App.2d Dist. 2001), for its holding that under
7 California Civil Code Section 3287(a), damages are made certain
8 by a jury verdict. *Kolodziey* is unpublished and cannot be cited
9 or relied on. Plaintiffs do not provide any other authority to
10 support their request for prejudgment interest from the November
11 14, 2006 memorandum decision.
12

13 Prejudgment interest is not awardable where the amount of
14 damages "depends upon a judicial determination based upon
15 conflicting evidence and is not ascertainable from truthful data
16 supplied by the claimant to his debtor." *Fireman's Fund Ins. Co.*
17 *v. Allstate Ins. Co.*, 234 Cal.App.3d 1154, 1173 (1991); *Highlands*
18 *Ins. Co. v. Cont'l Cas. Co.*, 64 F.3d 514, 521 (9th Cir. 1995).
19 Here, damages were not ascertainable until the court determined
20 them. Prejudgment interest on Plaintiffs' entire damages award is
21 not permissible under Section 3287(a).
22

23 Plaintiffs' request for prejudgment interest from November
24 14, 2006 is DENIED.
25

26
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28 ² 28 U.S.C. § 1961 imposes post-judgment interest.

1 (3) Section 3287(b)

2 Alternatively, Plaintiffs move for discretionary prejudgment
3 interest under Section 3287(b):

4 Every person who is entitled under any judgment to receive
5 damages based upon a cause of action in contract where the
6 claim was unliquidated, may also recover interest thereon
7 from a date prior to the entry of judgment as the court may,
8 in its discretion, fix, but in no event earlier than the
9 date the action was filed.

10 Cal. Civ. Code § 3287(b). Defendants do not address Plaintiff's
11 request for discretionary prejudgment interest under Section
12 3287(b) in their opposition.

13 Prejudgment interest is available under Section 3287(b) only
14 for "damages based upon a cause of action in contract." *Id.*
15 Having elected rescission, Plaintiffs' damages are not based in
16 contract. Plaintiffs cannot receive prejudgment interest under
17 Section 3287(b).

18 Plaintiffs' motion for prejudgment interest under Section
19 3287(b) is DENIED.

20 3. Judgment against New Plan

21 Plaintiffs move for judgment against New Plan. The vacated
22 amended judgment provided:

23 Judgment as a matter of law was entered in favor of
24 defendant NEW PLAN EXCEL REALTY TRUST, INC., and against
25 Plaintiffs, on November 23, 2003.

26 Doc. 426, ¶ 3. Plaintiffs assert that judgment as a matter of law
27 was granted to New Plan without prejudice under Paragraph 22.25
28 of the lease. Having elected rescission, Plaintiffs contend that

Paragraph 22.25³ of the lease no longer applies to absolve New Plan of liability, and judgment must be entered against it as Excel's general partner under California Corporations Code §§ 15643(b) and 15509(1). Both these sections of the California Corporations Code have been repealed. Defendants do not address this request in their opposition.

Plaintiffs are correct that rescission of the lease cancels Paragraph 22.25 of the lease *ab initio*. As explained in the November 19, 2004 Order:

Plaintiffs are correct in stating that rescission would void ordinary contractual clauses such as § 22.25. Once a contract is rescinded, all its provisions cease to have effect. See *Larsen v. Johannes*, 7 Cal.App.3d 491, 501 (Cal.Ct.App. 1970) (citing *Lemle v. Barry*, 181 Cal. 1, 5 (Cal.1919)). ('When a contract is rescinded, it ceases to

³ Paragraph 22.25 of the lease provides:

22.25 No Recourse Against Landlord. Tenant agrees that if Landlord is a general or limited liability partnership or joint venture, or if Landlord at any time becomes a general or limited partnership or joint venture, Tenant shall not make any claims against any partner (whether general or limited) or joint venture thereof by reason of any matter arising under the terms of this Lease or arising in connection with the use or occupancy of the Premises. No personal asset of any partner (whether general or limited) in such partnership or joint venture in such joint venture shall be subject to levy, execution, attachment, or other enforcement procedures by Tenant or any successor or assignee of Tenant on account of any matter whatsoever relating to this Lease or the use or occupancy of the Premises. Consistent with the intention expressed in the preceding portion of this section, and notwithstanding anything to the contrary contained in this Lease, Tenant agrees that in all events it shall look solely to the estate and property of Landlord in the Premises, regardless of whether the entity constituting Landlord is a corporation, partnership, limited liability company, joint venture, trust, individual or otherwise, for the collection of any judgment or other judicial process requiring the payment of money by Landlord with respect to any of the terms, covenants, or conditions of this Lease, and no other property or assets of Landlord shall become subject to levy, execution, attachment or other enforcement procedures for the satisfaction of Tenant's remedies.

Doc. 504-1, 22-23.

1 exist. If the action to rescind or an action based on an
2 alleged rescission or abandonment is successful, the
3 contract is forever ended and its covenants cannot
4 thereafter be enforced by any action'). In an unpublished
5 state court opinion, an analogous question was posed: 'The
6 issue presented is elemental - may a defendant resist an
7 action for rescission by relying on a liquidated damages
8 provision of the contract the plaintiff is seeking to
9 rescind? The answer is equally simple - no.' *BTS, Inc. v.*
10 *Sonitrol Corp. of Contra Costa*, No. 1093591, 2002 WL 234889
11 (Cal.App. 1 Dist., Feb. 19, 2002) ('rescinded contract is an
12 extinguished contract meaning that it has ceased to exist
13 and none of its provisions can be enforced by any party').

9 Doc. 353, 41-42. The limitations of the rescinded and no longer
10 applicable and enforceable lease are without effect. Rescission
11 is applicable to the entire lease under California law. Section
12 22.25 no longer shields New Plan from liability as a matter of
13 law. Under California law, "all partners are liable jointly and
14 severally for all obligations of the partnership unless otherwise
15 agreed by the claimant or provided by law." Cal. Corp. Code §
16 16306.
17

18 Plaintiffs' motion for judgment against New Plan is GRANTED.

19 IV. CONCLUSION

20 For the reasons stated:

- 21 1. Defendant's motion to strike is DENIED.
- 22 2. Plaintiff's request for entry of judgment of rescission and
23 for prejudgment interest is GRANTED in part and DENIED in
24 part, as follows:

- 25 a. Plaintiffs are entitled to an award of \$2,142,175 for
26 damages in rescission:
27

\$1,239,030	Construction Costs
\$ 589,271	Equipment Expenditures
\$ 30,000	Opening Inventory for Restaurant
\$ 104,176	Building & Related Fees
\$ 30,000	Franchise Fee
\$ 18,749	Training of Modesto Staff
\$ 27,956	Construction Interest
\$ 372,575	Rent Paid to Excel
\$ 186,394	Interest Paid After Opening
(\$ 434,716)	Credit for Rent Paid/Owed to Excel
(\$ 10,000)	Credit for Rental Income Credit
(\$ 11,260)	Credit for Equipment Sale
\$2,142,175	TOTAL

b. Plaintiffs' request for prejudgment interest is GRANTED as to the \$214,350 interest paid on the Money Store loan (\$27,956 in construction interest and \$186,394 in interest paid after opening) and DENIED as to the other unfixed components of Plaintiffs' damages award.

3. Plaintiffs shall submit a proposed form of order consistent with this memorandum decision within five (5) days following electronic service of this memorandum decision.

SO ORDERED.

DATED: July 5, 2011

/s/ Oliver W. Wanger
Oliver W. Wanger
United States District Judge